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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 FRANCES CLAIMONT,

11 Plaintiff,

12 v.

13 GENUTY INC., *et al.*,

14 Defendants.

15 Case No. C02-1876L

16 ORDER REGARDING PAUL
17 O'BRIEN'S MOTION FOR
18 SUMMARY JUDGMENT

19 FRANCES CLAIMONT,

20 Plaintiff,

21 v.

22 PAUL A. O'BRIEN,

23 Defendant.

24
25 I. INTRODUCTION

26 This matter comes before the Court on a motion for summary judgment filed by
27 individual defendant Paul O'Brien.¹ (Dkt. #127). Plaintiff Frances Clairmont is a former

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29 ¹ The parties requested oral argument; however, the Court finds that this motion is
30 appropriate for resolution without oral argument in light of the extensive briefing and lengthy
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1 employee of the now bankrupt Genuity, Inc. Plaintiff alleges that O'Brien, the former Senior
 2 Vice President of Sales of Genuity, wilfully denied commissions she earned during her
 3 employment. O'Brien counters that she was paid all commissions owed, and any nonpayment
 4 was the result of a bona fide dispute over whether the commissions were actually owed.

5 For the reasons set forth in this Order, the Court grants in part and denies in part
 6 O'Brien's motion for summary judgment.

7 II. DISCUSSION

8 A. Background Facts.

9 The relevant facts are set forth in detail in this Court's March 24, 2005 Order Granting
 10 Individual Defendants' Motions for Summary Judgment, and will not be repeated here. (Dkt.
 11 #125). Instead, the Court will briefly set forth O'Brien's role in the relevant events, viewing the
 12 facts in the light most favorable to plaintiff.

13 O'Brien served as Genuity's Senior Vice President of Sales from January, 2001 until the
 14 first week of April, 2002. O'Brien reviewed minutes from meetings of Genuity's Sales
 15 Compensation Committee (the "Committee"), and, according to plaintiff's version of the facts,
 16 he attended some meetings. In rare cases when the Committee could not resolve an issue, the
 17 issue could be escalated to O'Brien for review. Declaration of Paul O'Brien ("O'Brien Decl.")
 18 at ¶ 14. O'Brien, for all practical purposes, ended his duties as Senior Vice President of Sales,
 19 and became a "lame duck," as of March 11, 2002. O'Brien Dep. at 59.

20 According to the Genuity 2001 Sales Incentive Plan (the "Plan"), billings value credit was
 21 a component of the sales force's incentive compensation. "Billings are defined as the net value
 22 of all eligible invoices issued in a given period." Declaration of Lawrence Locker ("Locker
 23 Decl."), Ex. 2 (the Plan) at p. 9. For example, a salesperson could earn billings credit simply
 24 because one of his or her customers increased their usage of a Genuity product, even if that

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 26 oral argument regarding the other individual defendants' motions for summary judgment.
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1 salesperson did not bring in the customer or sell any products. O'Brien Dep. at 156. The
 2 Committee sent an e-mail to the sales force on October 26, 2001, stating that effective October
 3 1, 2001, the company was eliminating the billings component from the compensation structure
 4 for certain positions. Locker Decl., Ex. 15. The e-mail stated that the change was not being
 5 made to save the company money; instead, "it [was] being done to alleviate problems associated
 6 with billing and focus on order value and renewals for [the fourth quarter of the year]." Id. The
 7 e-mail further explained, "There will be no true ups² unless it is brought to the RVP and Sales
 8 Comp Committee." Id. O'Brien was one of the primary decision-makers in the decision to
 9 eliminate billings value commissions and to make the change retroactive.

10 Clairmont voluntarily settled her claims against Genuity. She sued three individual
 11 defendants in July 2002. In August 2002, she filed an amended complaint naming two
 12 additional individual defendants. In October 2004, Clairmont filed a separate action against
 13 O'Brien, which was subsequently consolidated with the case against the other five individual
 14 defendants. On March 24, 2005, the Court granted the other five individual defendants' motions
 15 for summary judgment and dismissed plaintiff's claims against them.

16 **B. Summary Judgment Standard.**

17 On a motion for summary judgment, the Court must "view the evidence in the light most
 18 favorable to the nonmoving party and determine whether there are any genuine issues of material
 19 fact . . ." Holley v. Crank, 386 F.3d 1248, 1255 (9th Cir. 2004). All reasonable inferences
 20 supported by the evidence are to be drawn in favor of the nonmoving party. See Villiarimo v.
Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). "[I]f a rational trier of fact might
 22 resolve the issues in favor of the nonmoving party, summary judgment must be denied." T.W.

26 ² According to Clairmont, a "true-up" is a way to compensate sales people for existing
 27 orders that generate more revenue than expected. Clairmont Dep. at 182.

1 Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987).³

2 **C. Wage Withholding.**

3 **1. Legal Standards.**

4 Clairmont alleges that O'Brien unlawfully withheld wages from her in violation of
5 Washington law. The relevant statute, RCW 49.52.070, provides:

6 Any employer and any officer, vice principal or agent of any employer who shall
7 violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall
8 be liable in a civil action by the aggrieved employee or his assignee to judgment
9 for twice the amount of the wages unlawfully rebated or withheld by way of
10 exemplary damages, together with costs of suit and a reasonable sum for attorney's
11 fees . . .

12 Section 1 of RCW 49.52.050 provides for liability against employers who "rebate" employees'
13 wages; that section plainly does not apply here. Section 2 provides for liability against any
14 "employer or officer, vice principal or agent of any employer," who

15 Wilfully and with intent to deprive the employee of any part of his wages, shall
16 pay any employee a lower wage than the wage such employer is obligated to
17 pay such employee by any statute, ordinance, or contract; . . .

18 RCW 49.52.050; see also Pope v. Univ. of Washington, 121 Wn.2d 479, 491 n.4 (1994)
19 (rejecting argument that the statute "establishes liability without fault"). Accordingly,
20 pursuant to the plain language of the relevant statutes, O'Brien can be held individually
21 liable only upon a showing of willfulness.

22 An employer does not "willfully" withhold wages if a bona fide dispute exists as to
23 the obligation of payment. See, e.g., Lillig v. Becton-Dickinson, 105 Wn.2d 653, 659
24 (1986). "The nonpayment of wages is willful when it is the result of a knowing and
25 intentional action and not the result of a bona fide dispute." Id. (citing Ebling v. Gove's
26 Cove, Inc., 34 Wn. App. 495 (1983)). A bona fide dispute exists when it is "fairly

27 ³ Clairmont has identified several inaccuracies in O'Brien's testimony, and she argues
28 that the credibility issue precludes summary judgment. The Court, however, does not engage in
 a credibility determination because in the context of a summary judgment motion the Court
 construes the facts in the light most favorable to Clairmont.

1 “debatable” whether a portion of the wages must be paid. See Allstot v. Edwards, 114 Wn.
 2 App. 625, 634 (2002). “Lack of intent may be established either by a finding of carelessness
 3 or by the existence of a bona fide dispute. . . . Affirmative evidence of intent to deprive an
 4 employee of wages, however, is necessary to establish liability under RCW 49.52.050.”
 5 Pope, 121 Wn.2d at 491 n.4. The issue of whether individuals have willfully withheld wages
 6 is typically an issue of fact. However, in some circumstances, the issue can be resolved at
 7 summary judgment. See, e.g., Brinson v. Linda Rose Jt. Venture, 53 F.3d 1044, 1050 (1995)
 8 (affirming grant of summary judgment when plaintiff provided only “conclusory” statements
 9 regarding wilfulness).

10 **2. Commissions Issues.**

11 As an initial matter, it is undisputed that O’Brien, as Senior Vice President of Sales,
 12 had the requisite authority over the payment of wages to be held individually liable. See
 13 Ellerman v. Centerpoint Press, 143 Wn.2d 514, 523 (2001). That authority, however, existed
 14 only during his tenure in the position. Clairmont’s claim for wrongful withholding is based
 15 on the same commissions issues underlying her claims against the other individual
 16 defendants. Some of those issues, however, arose only after O’Brien stepped down from his
 17 position and left the company; he cannot, therefore, be responsible for them. The Court
 18 therefore considers only the commissions issues that arose during O’Brien’s tenure as the
 19 Senior Vice President of Sales.

20 With the exception of Clairmont’s claim to billings value credit, she has presented no
 21 evidence that O’Brien ever made a decision regarding her disputed commissions. Instead,
 22 Clairmont argues that he should be held individually liable for two primary reasons. First,
 23 Clairmont argues that O’Brien promised her supervisor, Mary Crebassa, that if they closed
 24 the Microsoft WebTV Dial deal, they would be given the appropriate commission. Even if
 25 O’Brien made that statement, he did not wilfully withhold Clairmont’s wages because the
 26 two-year agreement was never executed. Instead, the parties ultimately executed a month-to-

1 month contract, which Genuity terminated in February 2002. Crebassa informed Clairmont
 2 right away that because of the nature of the final contract and the product, they would not
 3 receive a commission on the Microsoft deal. Crebassa Dep. at 123 (stating that she informed
 4 Clairmont that they would not “get credit” for the Microsoft deal); Declaration of Shannon
 5 McMinimee (“McMinimee Decl.”), Ex. F (Cribassa explaining that they had commission
 6 questions because “there was no written commission plan for the Dial product”).

7 Second, Clairmont argues that O’Brien wilfully withheld her wages because he was aware of
 8 her claims by virtue of his position, and had the authority to resolve them. These facts,
 9 however, fall far short of establishing that O’Brien intended to deprive her of wages.
 10 Instead, the Committee, not O’Brien had primary responsibility to consider the issues, but
 11 never reached a decision regarding the disputed commissions.

12 The lack of a decision from the Committee, however, is not dispositive of all
 13 Clairmont’s claims against O’Brien. O’Brien participated in the decision to eliminate
 14 billings value credit and to make the change retroactive, as a practical matter, to the
 15 beginning of 2001.⁴ Clairmont argues that the change had the effect of depriving her of
 16 billings value credit for the WebTV Dial deal for August, September, and October 2001.
 17 Although O’Brien argues that Clairmont was not entitled to the disputed billings value credit
 18 because the deal never posted to the Arbor Billings database, Clairmont has raised a genuine
 19 issue of fact regarding that issue.

20 Genuity undisputedly retained the discretion to modify its compensation plan at any
 21 time. However, in making the change retroactive to the beginning of the year, after
 22 employees had performed the work, the company arguably deprived its employees of
 23 compensation already earned. Compare Lillig, 105 Wn.2d at 600 (finding lack of intent
 24 where amount of bonus due under compensation plan was subject to some discretion), with

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 26 ⁴ O’Brien argues that he did not act alone in making the change. Whether or not others
 27 were involved in the decision is irrelevant for purposes of this motion.
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1 Ebling, 34 Wn. App. at 500 (affirming finding of wilfulness where employer lowered
2 employee's commission rate then applied the lower commission rate to transactions that were
3 executed before, but closed after, the change). The fact that an employee could appeal the
4 issue to the Regional Vice President and the Committee does not preclude a finding of intent.
5 In essence, the policy change shifted the burden to employees to convince the Committee
6 that they were entitled to payments they had arguably already earned in the first three
7 quarters of the year. O'Brien informed employees that in general, the company was "not
8 going to have a wholesale true-up of [the Plan]. . . . My general feeling was we were not
9 going to open the flood gates here to have true-ups going on. . . . To the best of my
10 knowledge that was my story and I was sticking to it." O'Brien Dep. at 114. Clairmont
11 appealed, but the issue was not resolved in her favor. The issue of whether O'Brien intended
12 for the change to result in the deprivation of earned wages is an issue of fact to be resolved at
13 trial. At the least, he acted intentionally in changing the policy, and the resulting wage
14 deprivation was foreseeable.

15 In sum, issues of fact remain regarding whether Clairmont received the appropriate
16 amount of billings value credit on the WebTV Dial deal for August, September, and October
17 2001, and whether O'Brien acted wilfully to deprive her of wages earned.

18 **D. Document Destruction.**

19 Clairmont argues that an inference of wilfulness is created because she requested but
20 never received copies of the Committee's meeting minutes. Although Clairmont admits that
21 O'Brien "does not appear to be at fault for the loss of those documents," she argues that an
22 inference against him is nonetheless appropriate because "his interests are closely aligned
23 with those of his former employer and colleagues." Plaintiff's Opposition at 13. The mere
24 fact that defendants' interests are aligned is insufficient to support an inference of wilfulness
25 against O'Brien.

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E. Rule 56(f) Continuance.

Although Clairmont deposed O'Brien as a non-party witness earlier in this litigation, she requests a continuance to depose him now that she has named him as a defendant. To obtain a Fed. R. Civ. P. 56(f) continuance, plaintiffs must make ““(a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists.”” See Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co., 353 F.3d 1125, 1129 (9th Cir. 2004) (internal quotation and citation omitted). The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment. Id. at 1129-1130.

In granting Clairmont’s motion to consolidate the case against O’Brien with the one against the other defendants, the Court noted that Clairmont knew about Mr. O’Brien’s relevance to this litigation since she filed her case in July 2002, yet she waited until October 2004 to bring an action against him. The Court found that plaintiff’s delay in suing Mr. O’Brien was egregious. Clairmont’s current attempt to take advantage of her delay by arguing that discovery in the case against O’Brien is still in its early stages must fail. Moreover, Clairmont has already deposed O’Brien, she has not identified additional facts she hopes to gain that would preclude summary judgment, and she cancelled his second deposition, which was scheduled for May 17, 2005. In light of these facts, plaintiffs’ request for additional time to conduct discovery is denied. See, e.g., Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co., 353 F.3d at 1129-30 (“The district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past, or if the movant fails to show how the information sought would preclude summary judgment”).

III. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART

1 defendant Paul O'Brien's motion for summary judgment (Dkt. #127). Clairmont may pursue
2 her claim that O'Brien wilfully denied her billings value commissions for the Microsoft
3 WebTV Dial deal for August, September, and October 2001; the remainder of her claims are
4 dismissed.

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6 DATED this 20th day of June, 2005.

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8 
9 Robert S. Lasnik
United States District Judge